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No. 82-571

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

WILLIE MAE PAYNE, *et al.*,
individually and on behalf of
all others similarly situated,
*Petitioners,*

v.

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC.,
*Respondents.*

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the District Court abuse its discretion in this employment discrimination action by excluding black males from a class represented by black female named plaintiffs, where these plaintiffs alleged claims of both racial and sexual discrimination which created a conflict between the interests of black males and females, and where there was no named black male plaintiff to represent a subclass of black males and guard against the effects of this conflict?

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

On March 2, 1972, Willie Mae Payne and Alma Jean Williams, both black females, and James Williams, a black male, filed a class action alleging race discrimination in respondents' ("Travenol") hiring, assignment, promotion and disciplinary practices. This action was filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981.

On November 16, 1972, the District Court conditionally defined a class under Fed. R. Civ. P. 23 as follows:

> All present, past and future black employees and all past and future black applicants for employment at the facility operated by defendants, or either of them, at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black employees of defendants and all black applicants for employment at said facility, prior to March 3, 1970 are excluded from the class.

On May 1, 1973, the court granted plaintiffs' motion to amend the complaint to include allegations of sex discrimination. On May 3, 1973, James Williams, the sole male plaintiff, moved to withdraw from the action citing religious reasons, and was permitted to do so on May 8, 1973. On June 15, 1973, Delilah Cherry and Birdie Lee Griffin, both black females, moved and were thereafter allowed to intervene. Their complaint in intervention alleged discrimination on the bases of race and sex. At this point the named plaintiffs were four black females, alleging both race and sex discrimination.

Subsequent discovery brought out plaintiffs' specific grievances. Plaintiffs asserted in answers to interrogatories that Travenol discriminated racially against black males in hiring for the Material Handler position, and against black females in hiring for the Assembler and clerical positions. They charged that Travenol discriminated sexually against females by assigning them upon hire as Assemblers rather than as higher paid Material Handlers, by requiring new Material Handlers to perform the most physically demanding work—discouraging females from accepting the position—and by requiring that first-line supervisors (Group Leaders) have prior experience as Material Handlers.

On October 29, 1974, Travenol moved the District Court to redefine the class, *inter alia*, to exclude black males because there was a conflict between the interests of the black female plaintiffs and the black males they sought to represent arising from the sex discrimination claims. On November 11, 1974,

plaintiffs moved the District Court to expand the class to include white females.

The District Court denied plaintiffs' motion to add white females to the class, granted Travenol's motion, and redefined the class conditionally as follows:

> All present, past, and future black female employees and all present, past and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitation that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

(App. 170a.) 416 F. Supp. 248, 253. The court also ordered plaintiffs to give notice of the litigation and class definition to members of the redefined class. (App. 171a.) No notice had been sent previously.

A bench trial commenced on March 3, 1975. On February 19, 1976, the District Court issued a Memorandum of Decision containing findings that plaintiffs had proved discrimination in certain of Travenol's employment practices and not in others, and issued an injunction. (App. 173a.) The District Court finalized the class definition on December 8, 1976 (App. 207a, 222a, 74 F.R.D. 14), and iterated that its definition was final on January 24, 1979 (App. 233a).

Following Travenol's appeal to the Court of Appeals for the Fifth Circuit from the injunction (App. 225a), and this Court's denial of plaintiffs' subsequent petition for certiorari (439 U.S. 835), the District Court referred to a special master the remaining issues of additional injunctive relief and back

pay. The special master issued his report and decree following additional discovery and a hearing. The decree prohibits Travenol from discriminating subjectively on the basis of race and sex in hiring or promotion, and, by reference to the prior injunction, prohibits certain educational requirements. (App. 266a.) It requires Travenol to post notices of job vacancies, and to adhere to specified promotion procedures (App. 270a-272a), and it establishes procedures to provide rightful place relief to members of the class in the form of hiring priorities and constructive seniority (App. 268a).

The District Court overruled the parties' various objections and adopted the special master's report and decree. (App. 264a.) The parties each noticed an appeal to the Court of Appeals. Travenol challenged the form of the decree, and challenged the absence of factual findings requisite to the ultimate finding of discrimination in the District Court's February 19, 1976 Memorandum of Decision, upon which the decree was based. Plaintiffs appealed the District Court's denial of additional injunctive relief.

The Court of Appeals required several adjustments in the form of relief, and moved back the opening dates for membership in the class. It refused to overturn the District Court's exclusion of black males from the class, agreeing that the sexual discrimination claim "plainly draws the interests of males into conflict with the interests of females." (App. 28a-29a.)

Travenol petitioned for rehearing with regard to the Court of Appeals' finding that Travenol had discriminated in hiring. The court denied this petition, and on October 4, 1982, Travenol filed a petition for certiorari with this Court (No. 82-589). The Court of Appeals also denied plaintiffs' petition for rehearing and suggestion for rehearing *en banc* with regard to the class definition and other issues. (App. 166a.)

## REASONS FOR DENYING THE PETITION

Plaintiffs contend that the Court of Appeals' affirmance of the exclusion of black males should be reviewed by this Court because the finding of a dispositive conflict is inconsistent with controlling law, because the departure of the sole male plaintiff was irrelevant under controlling law, and because the District Court should have sent notice to black males informing them of their exclusion from the class, even though they had never received notice of their conditional inclusion. Each of these contentions is incorrect. The class redefinition was mandated by precedent. Notice was not required and would have served no proper purpose. Plaintiffs have presented no questions warranting this Court's review.

### I. THE EXCLUSION OF BLACK MALES IS MANDATED BY FED. R. CIV. P. 23(a)(4)

The District Court's exclusion of black males from the class was a proper exercise of discretion, consistent with the precedent of this Court, and mandated by the requirement of Fed. R. Civ. P. Rule 23(a)(4) that a class action be maintained only if "the representative parties will fairly and adequately protect the interests of the class." The black female named plaintiffs could not be deemed adequate representatives of black males because their allegations of sex discrimination created an irreconcilable conflict between their own interests and the interests of black males. The absence of a male named plaintiff eliminated the possibility of guarding against the effects of this conflict.

Adequate representation, indeed due process, requires that the interests of class representatives not be antagonistic to or in conflict with the interests of those they purport to represent. *Hansberry v. Lee*, 311 U.S. 32, 44-46 (1940). Thus, in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), this Court determined that the named plaintiffs were not appropriate class representatives because their demand for a merger of the city- and line-driver collective bargaining units and seniority lists conflicted with a vote against such a merger by members of the class. Similarly, in *General Telephone Co. v. E.E.O.C.*, 446 U.S. 318, 331 (1980), the Court stated:

> [T]he adequate representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class. In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes.

The District Court correctly applied these principles when it modified the conditional class definition to exclude black males. The action was initially brought by two black females and a black male who alleged only racial discrimination. It was in this context that the District Court certified a class of black females and black males. Over a year later the two original female plaintiffs and two new female plaintiffs changed the entire character of the lawsuit by alleging sexual discrimination. With the withdrawal of the sole black male named plaintiff for religious reasons, only these black females remained to prosecute the race claims of males.

Travenol's subsequent discovery of plaintiffs' specific charges revealed a conflict between the interests of the black female plaintiffs and of black males. Plaintiffs charged racial discrimination against black males in hiring for the Material Handler position. They also charged that several practices relating to this position resulted in sexual discrimination against females: the assignment of females upon hire to Assembler rather than Material Handler, the requirement that new Material Handlers perform the most difficult tasks, and the requirement that first-line supervisors have experience as Material Handlers. Since the allegations of discrimination pertinent to placement of females in this position were sexual, the black female named plaintiffs could be expected to emphasize proof of sexual discrimination over race discrimination. Proof of sexual discrimination would result in constructive seniority relief for females at the expense of black males, whose race discrimination claims as to this position would have been discarded. Not only would the interests of black female

applicants thus conflict with those of black male applicants, but they would also conflict with those of black male employees who were hired after the black females had applied. By the same token, black females employed as Assemblers would have conflicting interests with black males employed as Material Handlers, both with respect to seniority if the females were to be placed in Material Handlers positions, and with respect to promotion to first-line supervision if they were not and thus continued to lack required experience.

Travenol presented this conflict to the District Court in a motion to redefine the class. As if to emphasize the importance of their sexual discrimination claims, plaintiffs moved to expand the class to include white females. The District Judge stated at oral argument:

> I think there is too much conflict between the males and the females in this situation for them to represent a class which would involve black males, or males of either race. There is a controversy in this case with reference to whether or not females should be permitted to be employed in the position of Material Handler in the plant, because they have always been assigned to and employed in the assembly part of the plant, and in that category which carries, as I understand it, a lower rate of pay. If these black female plaintiffs are going to get into a controversy with males, either white or black, then I don't think they can represent the male population of the plant so far as males or [sic] concerned . . . .

(App. 23a.) The District Judge granted Travenol's motion and denied plaintiffs' motion to include white females in the class. (App. 170a.)

Plaintiffs' contention that in affirming the exclusion of black males[1] the Court of Appeals relied on "abstract rules of thumb," inconsistent with this Court's recent ruling in *General*

[1] Plaintiffs did not appeal the District Court's refusal to include white females in the class.

*Telephone Co. of the Southwest v. Falcon*, ____ U.S. ____, 102 S. Ct. 2364, 2372 (1982), is baseless. The Court of Appeals and District Court based their conflict finding not on abstract rules, but on a factual analysis. The Court of Appeals stated:

> The conflict found by the district court here is straightforward: the female plaintiffs asserted that Travenol discriminates against females by typically assigning them to the lower-paying job of assembler while typically assigning males to the higher-paying job of material handler. The females, therefore, sought to establish that males were favored at their expense. This claim plainly draws the interests of males into conflict with the interests of females.

(App. 28a-29a.) The court continued in a footnote with the following quotation from *Colston v. Maryland Cup Corp.*, 26 F.R. Serv. 2d 940, 943 (D. Md. 1978):

> On the one hand, [the black female plaintiff] would argue that defendant's policies and practices discriminated in favor of males, including black males, and against females. At the same time, she would claim that defendant favored whites, including white females, over blacks. In light of these conflicting positions, plaintiffs would not be an adequate representative of either black males or white females.

(App. 29a.)

The conflict is real, not potential or abstract.[2] Indeed, its effects are revealed starkly by plaintiffs' contention here and in the Court of Appeals that black males have no "legally cognizable" interest in perpetuating sex discrimination in the

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[2] Plaintiffs do not fully describe the conflict in their Petition for a Writ of Certiorari. The conflict does not depend on "bumping" of incumbent male Material Handlers as they suggest. As plaintiffs concede, success on sexual discrimination claims requires "unhired black males and black male Custodians .... to compete with black women for future Material Handler positions." (*Petition*, p. 23.) They cynically decide this conflict themselves by pointing out that in return for this competition, some lower paying Assembler positions would be available to black males. They overlook, of course, the conflicts mentioned in the text at pages 6-7, *supra*.

Material Handler position. The Court of Appeals concluded correctly that, "Black males are entitled to a class representative who is free from a desire to prove a claim that will impair their interests." (App. 32a-33a.)

Plaintiffs contend more specifically that *Falcon* requires a balancing of common interests on the one hand with the conflict on the other, and that if the balance favors common interests the conflict should be ignored. (*Plaintiffs' Petition for Writ of Certiorari* ("*Petition*"), p. 11.) *Falcon* suggests no such thing. *Falcon* specifically did not treat the defendant's contention that the interests of the employee plaintiff conflicted with the interests of the rejected applicants the plaintiff sought to represent. 102 S. Ct. at 2371 n.13. The Court was not required to reach this contention because the plaintiff's claims did not satisfy the Rule 23 requirements of commonality and typicality. It rejected the Court of Appeals' presumption that discrimination claims by their nature require common proof, and are typical of all other discrimination claims—the bases for "across-the-board" actions. The Court ruled that a class should be certified only after a "vigorous analysis" shows satisfaction of Rule 23(a). 102 S. Ct. at 2373.

By way of example the Court pointed out that if,

> [an employer] used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the *commonality* and *typicality* requirements of Rule 23(a).

102 S. Ct. at 2371 n.15 (emphasis added). Similarly, the Court noted, subjective decision-making in hiring and promotion could justify a class of both applicants and employees. *Id.* But this language does not mandate a balancing of common interests with a conflict, as plaintiffs contend. The analysis in the footnote is limited to determining commonality and typicality. It says nothing about whether an employee can represent applicants in light of a conflict, and this Court's language

in *General Telephone Co. v. E.E.O.C.*, *supra*, 446 U.S. at 331, states that he cannot.[3]

Plaintiffs' emphasis on commonality and typicality among *some* of the respective claims of black females and black males in this action begs the question of what to do about an actual conflict arising from other claims. Their argument that commonality and typicality should outweigh the conflict would discard the requirement of adequate representation. Surely *Falcon* does not support this result.[4]

Plaintiffs' further contention that *Falcon* supports a balancing of "the risk of harm to black males caused by their inclusion with the harm black males would suffer by exclusion" (*Petition*, pp. 12-13) also is without a basis in the decision. The Court of Appeals determined correctly that, "[Plaintiffs'] argument diverts attention from the proper inquiry under Rule 23." (App. 33a.) The question the District Court had to decide was not what class definition would most benefit black males, but whether black males would be adequately represented and thus fairly bound to a judgment—win or lose. *See id.*

In any event, black males suffered no harm by their exclusion. They were free in the early stages of the litigation to intervene and seek an expansion of the class, and were free within the limitations period to commence separate actions. But none came forward, and plaintiffs now urge harm because

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[3] The Court of Appeals in the instant case noted that in "across-the-board" class actions employees often represent applicants and that "Title VII policies support a broad reading of Rule 23 ...." (App. 27a-28a.) Yet, despite this broad reading (which is inconsistent with *Falcon*) the court still found a conflict here.

[4] Plaintiffs similarly misconstrue the language in *Falcon* that weight should be given to whether "adjudication of [a] claim of discrimination in promotion would require the decision of any common questions concerning [hiring]" 102 S. Ct. at 2371, and to considerations of "efficiency and economy of litigation." 102 S. Ct. at 2372. (See *Petition*, p. 14.) This language also refers to the requirements of commonality and typicality, and does not suggest that a failure of adequate representation should be balanced out of the picture.

black males are not reaping rightful place relief from a litigation of which they are not a part.[5]

Plaintiffs' collateral contention that the District Court should have reevaluated the class definition after trial in light of the female plaintiffs' purported "adequate representation" of black males (*Petition*, pp. 16-18) fails to recognize when the conflict question must be decided. The Court of Appeals stated:

> We reject this argument. It is true that the court's responsibility to assess the adequacy of representation is an ongoing one. The district court may decertify a class after trial if plaintiff's trial performance showed him or her to be an inadequate class representative .... But the trial court is not required to hypothesize about the effect of an actual conflict of interests on the adequacy of plaintiffs' representation. It is enough to deny representation that the conflict is actual at the outset of the trial.

(App. 31a-32a.)

The *post hoc* hypothesizing plaintiffs seek would be inconsistent with *Falcon*: "We do not, of course, judge the propriety of a class certification by hindsight." 102 S. Ct. at 2372. Further, post-trial redefinition would deny a defendant its due process right to know against what it must defend. A class definition delimits the issues. Whatever case plaintiffs made in this litigation on behalf of black males was gratuitous; Travenol was not required to defend against it. The issues and liability cannot fairly be expanded after trial by the addition of a new category of class members.

Plaintiffs have not pointed to court of appeals precedent inconsistent with the District Court's exercise of discretion and the Court of Appeals' affirmance. In *Donaldson v. Pillsbury Co.*, 554 F.2d 825 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977), upon which plaintiffs rely, the Court of Appeals did not consider possible conflicts between the plaintiff and the class

[5] Black males do benefit from injunctive relief prohibiting racial discrimination.

she sought to represent. The question before the court was typicality.

Nor do the three cases plaintiffs cite involving representation of classes by collective bargaining representatives conflict with the holding here.[6] None of these cases involved the stark conflict between race and sex claims present in this action. Moreover, the unions in these cases were required to represent the interests of all employees under the scheme of federal labor laws, which "embodies the principles of nondiscrimination as a matter of highest priority . . . . " (*Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 65 (1975) ), and which establishes their duty of fair representation (*Vaca v. Sipes*, 386 U.S. 171 (1967) ). Individual litigants hold no comparable legal status.

## II. *FRANKS v. BOWMAN TRANSPORTATION CO.*, AND *ALBEMARLE PAPER CO. v. MOODY*, DO NOT REQUIRE CERTIFICATION OF A BROADER CLASS

*Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), do not require an expansion of the class to accommodate the salutory purposes of Title VII, as plaintiffs urge. (*Petition*, pp. 30-32.) Plaintiffs' contention that these cases require a broad reading of Rule 23 in Title VII actions is disposed of by the holding in *Falcon* that the Rule applies with complete force to these actions. Moreover, the Court of Appeals applied a broad reading here because of the Title VII context, and affirmed the District Court's exercise of discretion.

*Franks* and *Albemarle* do establish that proper parties who have proved discrimination are entitled to a complete remedy. But black males were not party to these proceedings.

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[6] Plaintiffs rely on *Int'l Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268-69 (4th Cir. 1981); *Int'l Woodworkers of America v. Georgia-Pacific Corp.*, 568 F.2d 64, 67-68 (8th Cir. 1977); and *Social Services Union, Local 535 v. County of Santa Clara*, 609 F.2d 944 (9th Cir. 1979). (*Petition*, pp. 28-29.)

## III. THE ABSENCE OF A BLACK MALE NAMED PLAINTIFF PRECLUDED CERTIFICATION

Plaintiffs' contention that the departure of the sole male plaintiff did not make the claims of black males moot (*Petition*, pp. 36-38) misses the point. Black males were excluded not because their claims were moot, but because the named plaintiffs could not adequately protect their interests. While pre-existing class certification may satisfy the case or controversy requirement after the subsequent departure of the named plaintiff (*Sosna v. Iowa*, 419 U.S. 393 (1975)), it does not permit, let alone mandate, continued representation of a segment of the class by remaining named plaintiffs who cannot represent that segment adequately. A case or controversy does not satisfy Rule 23.

The absence of a named black male plaintiff made continued inclusion of black males in the class improper because it eliminated the possibility of reducing the conflict by subdividing the class. As the Court of Appeals stated:

> Ordinarily, if a court discerns a conflict like the one in this case, the proper solution is to create subclasses of persons whose interests are in accord. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). Of course, each subclass must be headed by a person who claims the same injury as the subclass, but who lacks the fatal conflict. *See East Texas Motor Freight System, Inc. v. Rodriguez, supra; Johnson v. American Credit Co.*, 581 F.2d 526, 532-33 (5th Cir. 1978). In this case, after the sole black male plaintiff, James Williams, withdrew from the case, no named plaintiff existed to head a class of black males.

(App. 34a-35a.)[7]

Plaintiffs' related argument that the District Court was required to give notice to black males of their exclusion from

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[7] Subclassification without a subclass head for black males could do nothing to alleviate the conflict. A District Court is not to substitute itself for a named plaintiff and supervise the plaintiff's case to ensure against the results of a conflict, as plaintiffs suggest. (*Petition*, p. 38 n.2).

the class under Rule 23(e) is equally without merit.[8] Neither the May 1973 withdrawal of plaintiff Williams nor the December 1974 redefinition of the class was an event triggering the approval and notice provisions of Rule 23(e). These provisions are designed to prevent a plaintiff from selling out the class by entering into a collusive settlement with the defendant, as Judge Goldberg recognized in his dissent. (App. 153a n.22.) To this end, the rule requires that a court review and approve any "dismissal" or "compromise," and give notice to the class of the proposed terms. The notice serves this review by assuring that class members understand the proposed settlement and have an opportunity to submit their views to the court. *See generally,* 3B J. Moore, *Federal Practice* ¶ 23.80[3] (1982).

The purpose of the rule has no bearing when rights are not determined. The May 1973 withdrawal of plaintiff Williams did not determine rights of black males or remove them from the class. Indeed, they remained in the class for the next year and a half while defendant conducted discovery which revealed that their continued inclusion would be improper. Williams' withdrawal could not be considered a dismissal or compromise of the class claims within Rule 23(e). *See Zeffiro v. First Pennsylvania Banking & Trust Co.,* 82 F.R.D. 31 (E.D. Pa. 1979) (cited by Judge Goldberg; withdrawal of one of three named plaintiffs does not trigger Rule 23(e) notice requirement).[9]

The District Court's exclusion of black males in December 1974 also did not determine any rights of black males. They remained free to pursue any claims they may have had by other procedural means. A court notice would have served no

[8] It is perhaps worth noting that this argument was not discussed in the main brief.

[9] Plaintiffs' determination in May 1973 to allege sex discrimination and create the conflict had as great an impact on the continued inclusion of black males as the withdrawal of Mr. Williams. Plaintiffs do not contend that notice should have been sent of these allegations because, like the departure of Mr. Williams, they had no impact until the December redefinition.

purpose beyond soliciting a new black male named plaintiff—plaintiffs' stated reason for a notice. (App. 148a n.17.) The Court of Appeals correctly rejected this unseemly judicial role. (App. 37a.)[10]

Nor was notice required as a matter of discretion under Rule 23(d)(2). Black males would not have relied to their detriment on their conditional inclusion in the class because they were given no notice of it. Their knowledge of the action cannot be presumed (*see generally Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974)), and such a presumption would require the further presumption that they knew of their exclusion. This Court rejected such presumptions implicitly in *Falcon*, where it stated that a class certification order "particularly during the period before any notice is sent to members of the class, 'is inherently tentative.' " *General Telephone Co. of the Southwest v. Falcon*, *supra*, 102 S. Ct. at 2372, *citing Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978). In the absence of any facts showing reliance, the Court of Appeals correctly held that the District Judge properly exercised his discretion not to require notice. (App. 39a.)

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[10] Whether the narrowing of the class definition was a "dismissal" within Rule 23(e) is beside the point in any event. The rule provides for notice "in such manner as the court directs. . . ." "[T]his language is sufficiently flexible to permit a court to approve a dismissal, but to determine that no notice at all is required, where the dismissal will not result in any prejudice to the class." 3 H. Newberg, *Class Actions* § 4950 (1977). *See Bantolina v. Aloha Motors, Inc.*, 75 F.R.D. 26 (D. Hawaii 1977); *Berse v. Berman*, 60 F.R.D. 414 (S.D.N.Y. 1973).

The cases cited in Judge Goldberg's dissent do not support his contention that notice must be sent whenever a class is narrowed or a plaintiff withdraws. (App. 152a-153a n.20.) In *McArthur v. Southern Airways, Inc.*, 556 F.2d 298 (5th Cir. 1977), *vac. on other grounds*, 569 F.2d 276 (5th Cir. 1978), the class claims were dropped as part of a settlement agreement. 556 F.2d at 303. In *Ross v. Warner*, 80 F.R.D. 88 (S.D.N.Y. 1978), and *Turoff v. Union Oil Co. of California*, 61 F.R.D. 51 (N.D. Ohio 1973), the courts concluded that notice was required because the extensive publicity given to the cases would have caused the excluded class members to rely detrimentally on the class action. There is no similar record or contention here.

## CONCLUSION

For the reasons stated above the petition should be denied.

Respectfully submitted,

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